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EMPEROR v. TULA KHAN.

Tula Khan to be rigorously imprisoned for three years be set aside; that the said order be altered into one directing the detention of Tula Khan in rigorous imprisonment pending the orders of the Sessions Judge; that the order of the Sessions Judge dated 7th December 1907 be affirmed, and that the order of M. Mata Badal dated 27th November 1907 be modified to this extent that the sentence passed by him on Tula Khan under section 332 of the Indian Penal Code do take effect from the date of the expiration of Tula Khan's imprisonment for failure to give security for his good behaviour.

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APPELLATE CIVIL.

Before Mr. Justice Aikman and Mr. Justice Griffin.

HANWANT SINGH AND OTHERS (APPLICANTS) *v.* RAM GOPAL SINGH AND OTHERS (OPPOSITE PARTIES) *

Civil Procedure Code, sections 367, 588 (18)—*Dispute as to who is the legal representative of a deceased appellant—Appeal.*

Held on a construction of section 367 of the Code of Civil Procedure that a dispute as to who is the legal representative of a deceased appellant is not confined to the case of rival claimants to represent the deceased. *Subbayya* v. *Saminadayyar* (1) followed.

THE facts of this case are as follows:—

One Dunia Singh brought a suit against Ram Gopal Singh and others for redemption of a mortgage. The suit was dismissed by the Court of first instance. Dunia Singh filed an appeal against the decree of the first Court, but died after filing the appeal. Within the time allowed by law, Hanwant Singh and others, who were admittedly the sons of Dunia Singh's first cousin, applied to be brought on the record as appellants in place of the deceased Dunia Singh. The mortgagees defendants disputed their right to be brought on the record, on the ground that, being of illegitimate birth, they were not the legal representatives of the deceased. A considerable number of witnesses were examined, and in the result the District Judge held that the applicants had been unable to successfully rebut the evidence adduced by the other side. He consequently

* First Appeal No. 62 of 1907 from an order of G. A. Paterson, District Judge of Benares, dated the 6th of April 1907.

(1) (1895) I. L. R., 18 Mad., 496.

dismissed their application. Against this order the applicants appealed to the High Court. At the hearing a preliminary objection was raised that no appeal lay.

Munshi *Haribans Sahai*, for the appellants.

Pandit *Baldeo Ram Dave* and Munshi *Kalindi Prasad*, for the respondents.

AIKMAN and GRIFFIN, JJ.—One Dunia Singh brought a suit against the respondents for redemption of a mortgage. The suit was dismissed by the Court of first instance. Dunia Singh filed an appeal against the decree of the first Court, but died after filing the appeal. Within the time allowed by law, the appellants, who are admitted to be the sons of Dunia Singh's first cousin, applied to be brought on the record as appellants in place of the deceased Dunia Singh. The mortgagees, defendants respondents, disputed their right to be brought on the record, on the ground that, being of illegitimate birth, they were not the legal representatives of the deceased. A considerable number of witnesses were examined, and in the result the learned District Judge held that the appellants had been unable to successfully rebut the evidence adduced by the other side. He consequently dismissed their application. The present appeal has been preferred against the order of the learned Judge. For the respondents a preliminary objection is raised that no appeal lies. If the order of the Court below can be regarded as an order under section $\frac{367}{582}$ of the Court of Civil Procedure, there can be no doubt that a right of appeal is given by section 588, clause (18). Section 365 of the Code provides that the legal representative of a deceased plaintiff may, where the right to sue survives, apply to have his name entered on the record in place of the deceased plaintiff, and the Court shall thereupon enter his name and proceed with the suit. We think that this clearly applies to a case where it is not disputed that the applicant is the legal representative of the deceased. Here the applicants' claim to be regarded as the deceased's representatives was disputed. In our opinion section 367 applies to this case. It is contended by the learned vakil for the respondents that section 367 only applies when there are rival claimants to represent the deceased. We see no reason for placing any such restriction on the

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meaning of the section. In the case of *Subbayya* v. *Saminadayyar* (1) the learned Judges say:—"We agree with the Judge that a dispute within the meaning of that section (*i.e.*, section 367) need not be between persons claiming to represent the deceased plaintiff."

Coming then to the merits of the case, we have read all the evidence adduced by the parties. We regret we cannot agree in the conclusion arrived at by the learned Judge. It being admitted that the appellants are the sons of the deceased's first cousin, the onus was on the other side to prove the case of illegitimacy which they set up. They called three witnesses, not one of them a resident of the village in which the applicants live, and in which the deceased lived, and none of them related to the family. In our opinion the evidence of these witnesses is of a vague and inconclusive nature. For the applicants evidence was given by witnesses, some of whom were related to the applicants' family and others residents of their village. Even had the onus not been on the respondents, we should have considered the evidence of the appellants' witnesses in every way preferable to the evidence of the witnesses adduced by the respondents. We allow the appeal, and we set aside the order of the Court below rejecting the appellants' application, and we direct that the appellants be admitted to be the legal representatives of Dunia Singh for the purpose of prosecuting the appeal in the Court below. The appellants will have the costs of this appeal.

Appeal decreed.

(1) (1895) I. L. R., 18 Mad., 496.